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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-477

RICHARD E. GERSTEIN, STATE ATTORNEY FOR THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY, FLORIDA,

Petitioner

V.

ROBERT PUGH AND NATHANIEL HENDERSON, ON THEIR BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND THOMAS TURNER AND GARY FAULK ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

JIM VOLLERS
State's Attorney

LARRY GIST
Assistant State's Attorney

Supreme Court Building
Austin, Texas 78711

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

MAX P. FLUSCHE, JR.
Assistant Attorney General

Attorneys for Respondents

P. O. Box 12548, Capitol Station
Austin, Texas 78711

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PRELIMINARY STATEMENT

NOW COMES the State of Texas, by and through its Attorney General, John L. Hill, having been invited by the Court to file a brief as amicus curiae in the above entitled and numbered cause and files this its brief as amicus curiae.

The State of Texas has an interest in the subject matter involved in this litigation for the reason that the resulting decisions of this Court may well effect the pre-trial commitment of persons charged with offenses, particularly misdemeanors, pursuant to currently effective provisions of the Texas Code of Criminal Procedure.

OPINIONS BELOW

The original opinion of the United States District Court for the Southern District of Florida is reported at 332 F. Supp. 1107 (Southern Dist. of Florida 1971). The order adopting a plan to implement the original opinion is reported at 336 F. Supp. 490 (Southern Dist. of Florida, 1972). The District Court findings, requested by the Court of Appeals after oral argument are reported at 335 F. Supp. 1286 (Southern Dist. of Florida 1973). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 483 F. 2d 778 (5th Cir. 1973).

QUESTIONS PRESENTED

DO THE 4TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES REQUIRE THAT A STATE MUST GIVE DEFENDANTS CHARGED IN STATE COURT PURSUANT TO THE FILING OF AN INFORMATION BY A STATE ATTORNEY A PRELIMINARY HEARING TO DETERMINE PROBABLE CAUSE FOR THEIR ARREST?

STATUTORY PROVISIONS INVOLVED

Articles 2.09, 11.01, 11.05, 11.08, 11.09, 11.11, 11.40, 14.01, 14.06, 15.01, 15.04, 15.16, 15.17, 16.01, 16.07, 16.08, 16.17, 21.01, 21.20, 21.21, 21.22, and 23.01 of the Texas Code of Criminal Procedure. These articles are set forth in the Appendix hereto.

ARUGUMENT AND AUTHORITIES

It is the position of the State of Texas that a review of the Articles of the Texas Code of Criminal Procedure quoted in the Appendix hereto will demonstrate that all of the due process requirements of *Pugh v. Rainwater*, 483 F. 2d 778 (5th Cir. 1973) are met by the statutory provisions governing pre-trial confinement, preliminary hearings, and indictments. The Texas statutes authorize the arrest of an individual either with or without a warrant. Before a magistrate may issue a warrant of arrest, a sworn complaint must be made before him, showing probable cause. Misdemeanors are normally prosecuted with the filing of a complaint with the district or county attorney, who subsequently files an information with the court having jurisdiction, resulting in the issuance of a capias for the arrest of the accused.

Whether arrested with or without a warrant, the arrestee must be taken before a magistrate "without unnecessary delay". The magistrate is then required to admonish the arrestee of his rights including the right to an examining trial.

After being so admonished, the accused may either request than an examining trial be held, or waive his right to such proceeding.

The purpose of holding an examining trial is to allow the magistrate to inquire into the truth of the accusation and determine if probable cause exists for the continued holding of the accused. The defendant must be present during the hearing, and after a review of the evidence produced, the magistrate may either commit the defendant to jail, discharge him, or allow him to post bail. Furthermore, it is also provided by the statute that if the magistrate does not make an order within 48 hours after completion of the examining trial, his inaction operates as a finding of no probable cause and the accused must be discharged.

Ultimately, no person may be brought to trial on a felony accusation without the return of an indictment by a grand jury, whereas misdemeanor offenses can be brought to trial based on either an indictment, or information filed by the district or county attorney. Furthermore, once an indictment has been returned, the accused loses his right to an examining trial, as the issuance of the indictment reflects a determination by the grand jury of the existence of probable cause. Without conceding that the Court of Appeals for the Fifth Circuit has correctly construed the requirements of due process mandated by the Fourth and Fourteenth Amendments of the Constitution of the United States in *Pugh v. Rainwater,* supra, it appears that the Texas

procedure outlined in the statutes contained in the Appendix already provide for a determination of probable cause through an examining trial if the arrestee should request such an examining trial. This is particularly true of a person who is arrested and charged with a felony. The Texas Court of Criminal Appeals described the function of the examining trial in *Harris v. State,* 457 S. W. 2d 903 (Tex. Crim. App. 1970):

> "Though the preliminary hearing provided for in Article 16.01, V. A. C. C. P., may be a practical tool for discovery by the defendant, the primary justification for its existence is to protect the innocent defendant from incarceration on a totally baseless accusation. Therefore, before the accused may be held for grand jury action, our statutes require the prosecution to justify his incarceration by proving in an examining trial before a magistrate that there is probable cause to believe the accused committed the offense charged."

In the same case the Texas Court of Criminal Appeals goes on to say:

> "If the grand jury returns a true bill prior to the time that an examining trial is held, the principle purpose and justification of such hearing has been satisfied. See *Vincent v. United States,* 337 F. 2d 891 (8th Cir.), cert. den. 380 U. S. 988, 85 S. Ct. 1363 14 L. Ed. 2d 281. Action by a grand jury in returning the indictment supersedes the complaint procedure and eliminates the necessity of an examining trial. *Jaben v. United States,* 381 U. S. 214, 85 S. Ct. 1365, 14 L. Ed. 2d 345; *State v. Wiggleworth,* 18 Ohio St. 2d 171, 248 N. E. 2d 607."

Furthermore, the Respondent in the instant case does not contend that a probable cause hearing is required after indictment. Page 2 of Respondents' Brief.

The arrest and detention of a person accused of committing a misdemeanor in the State of Texas presents a somewhat different matter. A reading of Article 16.01, V. A. C. C. P., would seem to indicate that an examining trial is available to every person charged with an offense whether it be of the grade of felony or misdemeanor. The Texas Court of Criminal Appeals however has concluded otherwise in *Ex Parte Clark*, 417 S. W. 2d 402 (Tex. Crim. App. 1967). In this case the Court said:

> "We do not construe Article 16.01 of the 1965 Code as guaranteeing to an accused the right to an examining trial in a misdemeanor case. See: *Ex Parte Way*, 48 Tex. Crim. Reports, 584, 89 S. W. 1075, wherein it was held that under the 1925 Code there was no necessity for an examining trial in a misdemeanor case. Further, there is no showing that Appellant requested or was denied an examining trial."

From the foregoing quoted language it is impossible to predict what the Texas Court of Criminal Appeals would hold in the event that an examining trial in a misdemeanor case was requested by the accused. Furthermore, the above quoted language was recited by the courts prior to the decisions in this Court which emphasized the importance of providing a probable cause hearing to satisfy due process requirements.

Morrissey v. Brewer, 408 U. S. 471, 92 S. Ct. 2593, (1972); *Chadwick v. Pampa*, 407 U. S. 345, 92 S. Ct. 2119, (1972); *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); and *Stanley v. Illinois*, 405 U. S. 645, 92 S. Ct. 1208 (1972).

On the other hand, if the Texas Court of Criminal Appeals should continue to adhere to the position taken in *Clark*, supra, a person charged with a misdemeanor in Texas could very well continue to be held in confinement without the availability of the examining trial provided for in Article 16.01, V. A. C. C. P., or the preliminary hearing mandated by *Pugh v. Rainwater*, supra.

In this posture then does the failure to accord to each person charged with a misdemeanor an automatic preliminary hearing or examining trial amount to a deprivation of due process? The State of Texas submits that the answer to this question should be in the negative for two reasons:

1) That in the case of each person who is confined pursuant to a warrant of arrest issued after being charged with a misdemeanor may challenge his incarceration by way of writ of habeas corpus pursuant to the provision of Article 11.09, V. A. C. C. P.
2) That the contentions of the Respondent are in reality a challenge upon the fact of confinement and should therefore be disposed of by a writ of

habeas corpus rather than by bringing an action under the Civil Rights Act, 42 U. S. C. A. § 1983.

From a reading of Articles 11.09 and 11.40, V. A. C. C. P., it is apparent that a person charged with a misdemeanor in Texas is entitled to test the validity of his pre-trial confinement by an application for writ of habeas corpus. In the instant case in arguing before this Court, counsel for the Respondent admitted that if he had the writ of habeas corpus available to him he would not be before the Court. On the other hand, they argued that the person confined must not only have some remedy but he must also have it provided to him by the State automatically. At another point in his argument he contended that he was not contesting the fact of confinement but that he was seeking only a hearing before the magistrate to determine probable cause. It seems absurd to say that you are not seeking release from confinement while at the same time demanding a hearing before a magistrate to determine probable cause for continued retention. It is submitted that this argument was fashioned by Respondent in order to avoid the consequences of *Preiser v. Rodriguez*, ___ U. S. ___, 93 S. ct., 1827 (1973).

In *Preiser v. Rodriguez*, this Court held:

> "Upon that question, we hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the release he seeks is a determination that he is entitled to immediate or more speedy release from that imprisonment, his sole federal remedy is a writ of habeas corpus."

It seems clear that in demanding a due process hearing for a determination of probable cause, Respondent is in essence seeking to challenge the very fact of his confinement. What other purpose could be served by a determination of probable cause at that juncture? The answer and the only answer is that he is seeking his release from confinement and that his remedy is therefore by writ of habeas corpus. If in fact there is no viable opportunity for a writ of habeas corpus in the State of Florida the remedy of Respondent is to petition by way of *federal* habeas corpus alleging the absence of such a remedy in the state court for the assumption of jurisdiction by the federal court. This it seems is the clear meaning of *Preiser v. Rodriguez*. In the State of Texas there is available to a pre-trial detainee the opportunity to bring a writ of habeas corpus and therefore the rationale of *Preiser v. Rodriguez*, would demand that he exhaust his remedies in the state court prior to seeking relief in the federal courts.

To entertain this suit as a civil rights suit and to grant the relief sought by Respondent in the instant case, will be to have the Supreme Court to prescribe the Code of Ciminal Procedure for various states. This avenue was specifically rejected by this Court in *Morrissey v. Brewer*, supra, wherein it was said:

> "We cannot write a Code of Procedure; that is the responsibility of each state. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of the due process."

The quoted portion of the decision in *Morrissey v. Brewer* concerns itself with the due process requirements of parole revocation proceedings. It is significant that the due process requirements of *Morrissey v. Brewer* were raised by way of habeas corpus. In *Preiser v. Rodriguez* this Court cites a wide variety of challenges to confinement as being properly raised by way of habeas corpus:

> "Thus, whether the petitioner's challenge to his custody is that the statute under which he stands convicted is unconstitutional, as in *Ex parte Siebold*, supra; that he has been imprisoned prior to trial on account of a defective indictment against him, as in *Ex parte Royall*, 117 U. S. 241, 6 S. Ct. 734, 29 L. Ed. 868 (1886); think he is unlawfully confined in the wrong institution, as in *re Bonner*, 151 U. S. 242, 14 S. Ct. 323, 38 L. Ed. 149 (1894), and *Humphrey v. Cady*, 405 U. S. 504, 92 S. Ct. 1048, 31 L. Ed. 2d 394 (1972); that he was denied his constitutional rights at trial, as in *Johnson v. Zerbst*, supra; that his guilty plea was invalid as in *Von Moltke v. Gilies*, 332 U. S. 708, 68 S. Ct. 316, 92 L. Ed. 309 (1948); that he is being unlawfully detained by the Executive or the military, as in *Parisi v. Davidson*, 405 U. S. 34 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972); or that his parole was unlawfully revoked causing him to be recarcerated in prison, as in *Morrissey v. Brewer*, 408 U. S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) - in each case his grievance is that he is being unlawfully subjected to physical restraint, and in each case habeas corpus has been accepted as the specific instrument to obtain release from such confinement."

It is respectfully submitted that all challenges to pre-trial commitment procedures should be raised by

writs of habeas corpus according to the rationale of *Preiser v. Rodriguez*. The decision of the Court of Appeals for the Fifth Circuit should be reversed for the reason that it has utilized the wrong vehicle, 42 U. S. C. A. 1983, in attempting to impose its view of due process requirements upon the individual states.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to reverse the judgment of the Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

JOE B. DIBRELL
Assistant Attorney General

MAX P. FLUSCHE, JR.
Assistant Attorney General

Attorneys for Respondents

P. O. Box 12548, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I, Max P. Flusche, Jr., Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing Brief of the State of Texas as Amicus Curiae has been deposited in the United States Mail, postage prepaid, certified, on this the _____ day of August, 1974 to the following addresses: Mr. Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, Mr. Phillip A. Hubbart, Esquire, Metropolitan Justice Building, 1351 N. W. 12 Street, Miami, Florida, Mr. Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N. E. First Avenue, Miami, Florida, Mr. Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, and Mr. George R. Georgieff, Assistant Attorney General of Florida, The Capitol Building, Tallahassee, Florida 32304.

MAX P. FLUSCHE, JR.
Assistant Attorney General

APPENDIX

Article 2.09 - Who Are Magistrates:

Each of the following officers is a magistrate within the meaning of this Code; the judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Courts, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Article 11.01 - What Writ Is:

The writ of habeas corpus is the remedy to be used when any person is restrained in his liberty. It is an order issued by a court or judge of competent jurisdiction, directed to anyone having a person in custody, or under his restraint, commanding him to produce such person, at a time and place named in the writ, and show why he is held in custody or under restraint.

Article 11.05 - By Whom Writ May Be Granted:

The Court of Criminal Appeals, the District Court, the County Court, or any judge of said Courts, have power to issue the writ of habeas corpus; and it is their duty, upon proper motion, to grant the writ under the rules prescribed by the law.

Article 11.08 - Applicant Charged with Felony:

If a person is confined after indictment on a charge of felony, he may apply to the judge of the court, in which he is indicted; or if there be no judge within the district, then to the judge of any district whose residence is nearest to the courthouse of the county in which the applicant is in custody.

Article 11.09 - Applicant Charged with Misdemeanor:

If a person is confined on a charge of misdemeanor, he may apply to the County judge of the county in which the misdemeanor is charged to have been committed, or if there be no county judge in said county, then to the county judge whose residence is nearest to the courthouse of the county in which the applicant is held in custody.

Article 11.11 - Early Hearing:

The time so appointed shall be the earliest day which the judge can devote to hearing the cause of the applicant.

Article 11.40 - Prisoner Discharged:

The judge or court before whom a person is brought by writ of habeas corpus shall examine the writ and the papers attached to it; and if no legal cause be shown for the imprisonment or restraint, or if it appears that the imprisonment or restraint though at first legal, cannot for any cause be lawfully prolonged, the applicant shall be discharged.

Article 14.01 - Offense Within View:

(a) A peace officer or any other person, may without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Article 14.06 - Must Take Offender Before Magistrate:

In each case enumeraged in this Code, the person making the arrest (WITHOUT A WARRANT) shall take the person arrested or have him taken without unnecessary delay before the magistrate who may have ordered the arrest or before some magistrate of the county where the arrest was made without an order. The magistrate shall immediately perform the duties described in Article 15.17 of this Code.

Article 15.01 - Warrant of Arrest:

A "warrant of arrest" is a written order from a magistrate, directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense, to be dealt with according to law.

Article 15.04 - Complaint:

The affidavit made before the magistrate or district or county attorney is called a "complaint" if it charges the commission of an offense.

Article 15.16 - How Warrant is Executed:

The officer or person executing a warrant of arrest shall without unnecessary delay take the person or have him taken before the magistrate who issued the warrant or before the magistrate named in the warrant, if the magistrate is in the same county where the person is arrested. If the issuing or named magistrate is in another county, the person arrested shall without unnecessary delay be taken before some magistrate in the county in which he was arrested.

Article 15.17 - Duties of Arresting Officers And Magistrates:

In each case enumerated in this Code, the person making the arrest shall, without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested. The magistrate shall inform in clear language the person arrested of the accusation against him, and of any affidavit filed therewith, of his right to retain counsel, of his right to remain silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the State, of his right to terminate the interview at any time, of his right to request the appointment of counsel if he is indigent and cannot afford counsel, and of his right to have an examining trial. He shall also inform the person arrested that he is not required to make a statement and that any statement made by him may be used against him. The Magistrate shall allow the person arrested reasonable time and the opportunity to consult counsel and shall admit the person to bail if allowed by law.

Article 16.01 - Examining Trial:

When the accused has been brought before a magistrate for an examining trial, that officer shall proceed to examine into the truth of the accusation made, allowing the accused, however, sufficient time to procure counsel. In a proper case, the magistrate may appoint counsel to represent the accused in such examining trial only, to be compensated as otherwise provided in the Code. The accused in any felony case shall have the right to an examining trial before indictment in the cpimtu having jurisdiction of the offense, whether he be in custody or on bail, at which time the magistrate at the hearing shall determine the amount or sufficiency of bail, if a bailable case.

Article 16.07 - Same Rules of Evidence As On Final Trial:

The sames rules of evidence shall apply to and govern a trial before an examining court that apply to and govern a final trial.

Article 16.08 - Presence of Accused:

The examination of each witness shall be in the presence of the accused.

Article 16.17 - Decision of Judge:

After the examining trial has been had, the judge shall make an order committing the defendant to jail of the proper county, discharging him or admitting him to bail, as the law and the facts of the case may require. Failure of the judge to make or enter an order within 48 hours after the examining trial has been completed operates as a finding of no probable cause and the accused shall be discharged.

Article 21.01 - Indictment:

An "indictment" is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense.

Article 21.20 - Information:

An "information" is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted.

Article 21.21 - Requisites of an Information:

An information is sufficient if it has the following requisites;

1. . . .
2. That it appear to have been presented in a court having jurisdiction of the offense set forth;
3. That it appears to have been presented by the proper officer.
4. That it contain the name of the accused . . .
5. It must appear that the place where the offense is charged to have been committeed within the jurisdiction of the court where the information is filed.
6. That the time mentioned be some date anterior to the filing of the information . . .
7. That the offense be set forth in plain and intelligible words.
8. . . .
9. That it be signed by the district or county attorney, officially.

Article 21.22 - Information Based Upon Complaint:

No information shall be presented until affidavit has been made by some credible person charging the defendant with an offense. The affidavit shall be filed with the information. It may be sworn to before the district or county attorney who, for that purpose, shall have power to administer the oath, or it may be made before any officer authorized by law to administer oaths.

Article 23.01 - Definition of "Capias":

A "capias" is a writ issued by the court or clerk, and directed "To any peace officer of the State of Texas", commanding him to arrest a person accused of an offense and bring him before that court immediately, or on a day or at a term stated in the writ.